In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 965

HOWARD S. KATZ and DAVID A. BAUMANN,
PETITIONERS

v.

HONORABLE HAROLD R. TYLER, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. On February 21, 1966, petitioners commenced an action in the United States District Court for the Southern District of New York under 28 U.S.C. 1331 against the President of the United States, the Secretary of Defense and the Director of the Selective Service System, seeking injunctive relief and a judgment declaring the Universal Military Training and Service Act (50 U.S.C. App. 451-473) to be unconstitutional under the Ninth Amendment to the

United States Constitution and Article Eight of the Charter of the International Military Tribunal, 59 Stat. 1546 ("the Nuremberg charter").

At the time the suit was instituted, petitioner Baumann had received his notice of induction into the armed forces, but had not yet been inducted. A few days afterwards, Baumann was inducted into the army. Petitioner Katz had enlisted in the Rhode Island National Guard following receipt of an induction notice and had served on active duty for a year. He was then reclassified 1-D by his selective service board. On April 18, 1966, he was released from the Rhode Island National Guard and placed on the rolls of the United States Army Reserve. The six-year service obligation resulting from his enlistment in the National Guard will terminate on October 10, 1969.

The district court held that Katz did not have the necessary standing to sue. As to Baumann, the court ruled that, in view of his induction and the availability of habeas corpus, a declaratory judgment and an injunction were no longer appropriate remedies (Pet. 5a-7a). The court further held that petitioners' contentions did not raise substantial questions relating to the validity of the statute. The court therefore denied petitioners' motion to convene a three-judge district court and granted the motion of defendants to dismiss the complaint (Pet. 11a). An application to the court of appeals for a writ of mandamus to compel the convening of a three-judge court was denied without opinion on October 19, 1966 (Pet. 13a).

2. Laying to one side the questions whether petitioners had standing to sue and whether mandamus in the court of appeals was the proper remedy, it is entirely clear, we submit, that petitioners' attack on the Universal Military Training and Service Act presented no question sufficiently substantial to warrant the convening of a three-judge court. See, *e.g.*, *Ex Parte Poresky*, 290 U.S. 30; *Bailey* v. *Patterson*, 369 U.S. 31. To be sure, no court has considered the validity of the Act under the Ninth Amendment, but it is plain that the Amendment has no bearing on the Act. The Ninth Amendment reserves to "the people" only *unenumerated* rights (see *Griswold* v. *Connecticut*, 381 U.S. 479, 492 (concurring opinion)). The power of Congress to enact a law providing for conscription in this country has often been upheld under Article I, Section 8 of the Constitution as a valid exercise of the authority to "raise and support armies." *Selective Draft Law Cases*, 245 U.S. 366; *United States* v. *Williams*, 302 U.S. 46; *Lichter* v. *United States*, 334 U.S. 742, 756 (dictum); *Etcheverry* v. *United States*, 320 F. 2d 873 (C.A. 9), certiorari denied, 375 U.S. 930; *United States* v. *Henderson*, 180 F. 2d 711 (C.A. 7), certiorari denied, 339 U.S. 963; *United States* v. *Mitchell*, 246 F. Supp. 874 (D. Conn.).

Petitioners' reliance upon the Eighth Article of the Nuremberg Charter is also misplaced. That Charter was designed to implement an "agreement" between the United States, France, the United Kingdom, and the Soviet Union respecting "the prosecution and punishment of the major war criminals of the Euro-

pean Axis." 59 Stat. 1544. It established an International Military Tribunal which was given jurisdiction over "persons who, acting in the interests of the European Axis countries * * * committed any of the following crimes * * * (a) crimes against peace * * * (b) war crimes * * * (c) crimes against humanity * * *." 59 Stat. 1546-7. Article Eight provides (59 Stat. 1548):

> The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

Petitioners are not charged with having committed any of the above-enumerated crimes. The Nuremberg Charter therefore has no application to the present action.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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